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DECISION



**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D. C. 20548

FILE: B-204544

DATE: October 28, 1981

MATTER OF: Kenneth R. Ludwig - Retroactive Promotion -
Backpay

DIGEST: Agency's improper designation of GS-13 employee's change of duty station as a temporary reassignment delayed employee's promotion to GS-14. Employee is not entitled to a retroactive promotion since the error did not prevent a personnel action from taking effect as originally intended, the employee was not deprived of a right granted by statute or regulation, nor was a nondiscretionary agency regulation or policy violated.

Philip L. McKinney, Acting Chief, Branch of Financial Management, United States Department of the Interior, Reston, Virginia, has requested an advance decision on the claim of Dr. Kenneth R. Ludwig for a retroactive promotion.

We conclude that the claim must be denied because the administrative error involved does not constitute an unjustified or unwarranted personnel action under the Backpay Act.

In May 1980, Dr. Kenneth R. Ludwig, a GS-13, Geologist with the Branch of Uranium and Thorium Resources, Geologic Division, Lakewood, Colorado, was transferred to a temporary duty station in Adelaide, Australia. Dr. Ludwig's transfer on May 22, 1980, was designated as a temporary reassignment and a new position description was prepared in order to obtain headquarters classification approval.

During the period of his overseas assignment, Dr. Ludwig's qualifications and work performance were reviewed through an evaluation process conducted annually by the Geologic Division. Dr. Ludwig was determined to have met eligibility criteria for GS-14, Geologist, and the evaluating panel's recommendation for promotion subsequently was approved by the Chief Geologist and Director of Geological Survey. In

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accordance with agency procedure, a position description for GS-14, Geologist, was certified by a classification specialist, and a Request for a Personnel Action was approved by a staffing specialist. The Request for Personnel Action was then forwarded to the Chief of Personnel Management Systems and Processing Section, to whom the Personnel Officer had delegated authority to approve promotions. On July 28, 1980, the Section Chief cancelled the Request for Personnel Action for the reason that Dr. Ludwig's promotion could not be processed while he was on temporary reassignment.

During the period August 1980 to February 6, 1981, the Headquarters Administrative and Personnel Offices investigated the personnel action taken on May 22, 1980, concerning Dr. Ludwig's change of station and determined that the Personnel Office had improperly designated the transfer as a temporary reassignment. Following corrective action, the Personnel Officer approved Dr. Ludwig's promotion to GS-14, Geologist, effective February 8, 1981. On February 10, 1981, Dr. Ludwig requested that his promotion be made effective July 27, 1980, and that he be paid based on the difference in salary between grades GS-13 and 14 for the period July 27, 1980, to February 7, 1981.

Backpay may be awarded under the authority of 5 U.S.C. § 5596 (1976), as a remedy for wrongful reduction in grade, removals and suspensions, and other unjustified or unwarranted actions affecting pay or allowances. A prerequisite for the award of backpay is a determination by appropriate authority that an employee has undergone an unjustified or unwarranted personnel action. We have recognized as unjustified and unwarranted actions, clerical or administrative errors that (1) prevented a personnel action from taking effect as originally intended, (2) deprived an employee of a right granted by statute or regulation, or (3) would result in failure to carry out a nondiscretionary administrative regulation or policy if not adjusted retroactively. See Ruth Wilson, 55 Comp. Gen. 836 (1976); 54 Comp. Gen. 888 (1975). For purposes of the Backpay Act, nondiscretionary provision is any provision of law,

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Executive order, regulation, personnel policy, or collective bargaining agreement that requires an agency to take a prescribed action under stated conditions or criteria. 5 C.F.R § 550.802(d) (1978). See John Cahill, 58 Comp. Gen. 59 (1978).

It is a well settled rule that the granting of promotions from grade to grade is a discretionary matter primarily within the province of the administrative agency involved. 54 Comp. Gen. 263 (1974); William Scott, B-182565, May 29, 1975. By statute, regulation or agency policy mandating promotion within a particular time frame or under specific conditions, the granting of a promotion may become nondiscretionary, or a matter of right so as to warrant backpay under the standards cited above. See Joseph Pompeo, B-186916, April 25, 1977. However, absent such law, regulation or policy, a promotion may be made retroactively only on the basis of a clerical or administrative error that prevented its taking effect as originally intended.

There is nothing in the record to indicate that the promotion of Dr. Ludwig was nondiscretionary. While it may be customary for the Chief of Personnel Management Systems and Processing Section to promote those geologists who are evaluated favorably by the evaluation panels and approved for promotion by the Chief Geologist and Director of Geological Survey, there is no statute, regulation, labor-management agreement, or other binding agency directive which mandated the promotion of Dr. Ludwig within a given time. Nor does there appear to be an agency regulation, policy or procedure regarding processing time for promotion requests. The record does show that there was an error in designating Dr. Ludwig's change of station as a temporary reassignment. The particular error, however, was not of a type that would support the granting of a retroactive promotion.

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For the reasons stated above we hold that Dr. Ludwig's promotion to GS-14 may not be effected retroactively.

for *Milton J. Aroslan*
Comptroller General
of the United States